APPEAL NO. 051645
FILED SEPTEMBER 1, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 21, 2005. With regard to the sole issue before him the hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appealed, contending that the claimant had "failed to make a good faith effort commensurate with his ability to work during the qualifying period" and that the claimant did not meet the criteria for SIBs. The claimant responded urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable (low back) injury on _____, that the claimant has an impairment rating (IR) of 15% or more, that the claimant has not commuted any portion of impairment income benefits and that the qualifying period for the first quarter is from January 4 through April 4, 2005.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the first quarter. The claimant proceeds on a theory of a total inability to work in any capacity. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer comments that (Dr. W), incorporates the findings of (Dr. C), who performed functional capacity testing, and that the reports of Dr. W and Dr. C "constitute a narrative that specifically explains how the Claimant's injury causes a total inability to work between January 4, 2005, and April 4, 2005." In evidence is a summary of a functional capacity evaluation (FCE) performed on January 11, 2005, which indicates under "current PDL [physical demand level]: NO ABILITY BELOW the Waist SEDENTARY Above the Waist" (emphasis in the original) and a comment from Dr. C that the claimant:

> "DOES NOT MEET the requirements, safety, or performance ability to do their [sic] job safely, effectively or confidently. He SHOULD NOT

> RETURN WORK until they [sic] can demonstrate objective improvement and ability to perform their [sic] job safely and effectively[.] Psychological Intervention may be necessary secondary to signs of poor psychodynamics and inappropriate pain behaviors, whether intentional or not."

A progress note dated February 9, 2005, from Dr. W states that the claimant "continues with back pain but this is well controlled with medications. His [temporary income benefits] TIBs will need to be continued until he can reach a satisfactory functional status, thus now he is incapable of work." In evidence is the report of another FCE performed on April 8, 2005 (shortly after the relevant qualifying period) from a doctor other than Dr. W and Dr. C, which has the impression that the claimant "IS NOT ABLE to return to work safely as a pipe layer at this time." (Emphasis in the original.) It is problematic whether the reports from Dr. W and Dr. C, taken together constitute a narrative from a doctor that specifically explains how the compensable injury causes a total inability to work particularly where there seems to be confusion whether the doctors are using a disability standard or the higher SIBs standard.

The carrier contends that there are records that show the claimant is capable of doing some type of work referring to an FCE "(not the FCE by the treating chiropractor's office, but the other one)," a video tape (which had been excluded by the hearing officer as not being timely exchanged) and the records of (Dr. A). The carrier does not identify either by date performed or exhibit number to what FCE they are referring. As indicated, the video is not considered as having been excluded by the hearing officer. In evidence are what appear to be identical reports from Dr. A, (Claimant's Exhibit No. 6 with a report date of January 18, 2005, and Carrier's Exhibit D with a report date of January 21, 2005). Dr. A notes that current visits to Dr. W "are infrequent," and diagnoses is failed back surgery syndrome. Dr. A comments that it appears to him "that at the present time [the claimant] has more psychosocial obstacles to any return to gainful employment[,] education level etc. mostly get in the way, but his physical problem is under good control with the operation." Dr. A comments that the claimant's prognosis "is poor, not on the basis of his surgery but on his symptoms. . . for which there is no explanation. . . ." Dr. A concludes that the claimant has a light work ability with "a very poor performance on his FCE." The hearing officer notes that Dr. A examined the claimant on January 11, 2005, that he requested an FCE and that Dr. C performed the FCE on January 11, 2005. Regarding Dr. A's report the hearing officer only commented that there "is no other credible medical record that shows the Claimant is able to return to work" and that the evidence indicates that the claimant was "unable to work between January 4 and April 4, 2005." There is no indication that light, sedentary or part-time work was considered.

The Appeals Panel has held that in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Appeals Panel Decision (APD) 020041, decided February 28, 2002. However, "[t]he mere existence of a medical report stating

the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determined that it failed to show this." However, in the instant case, we cannot agree that no other record showed that the claimant had an ability to work during the relevant time period. The test is not whether the claimant can return to work in his preinjury position or can obtain and retain gainful employment or full-time employment. APD 031089, decided June 23, 2003. In this case even the claimant's doctors refer to poor psychodynamics and inappropriate pain behavior and Dr. A believes the claimant has a light work ability. The hearing officer does not comment on the inappropriate pain behavior or whether the claimant might return to some kind of light and/or part-time work. In the absence of any such explanations we hold that the hearing officer's determination that the claimant met the requirement to attempt on good faith to obtain employment commensurate with the claimant's ability to work as set forth in Rule 130.102(d)(4) is against the great weight and preponderance of the evidence.

Accordingly, the hearing officer's determination that the claimant is entitled to SIBs for the first quarter is reversed and a new decision is rendered that the claimant is not entitled to SIBs for the first quarter.

The true corporate name of the insurance carrier is **ARGONAUT-SOUTHWEST INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JOSEPH A. YURKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge